UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

June 6, 2003

United States Department of Transportation
400 7th St., S.W.
Washington, D.C. 20590

Re: Federal Trade Commission Comments to be filed in Dockets OST-97-2881, OST-97-3014, and OST-98-4775

The Department of Transportation ("DOT" or "Department") has requested comment on its rules governing airline computer reservations systems ("CRSs" or "systems"). The Federal Trade Commission ("FTC" or "Commission") offers the following comments to assist DOT in its rulemaking. Although the interpretation of the Department's legal authority is not within the FTC's purview, the Commission offers its comments to address and clarify some of the references to FTC doctrine discussed and relied upon in DOT's rulemaking proceeding.

The FTC is charged by statute with enforcing laws prohibiting unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce.[(1)] Pursuant to this statutory mandate, the Commission is responsible for protecting consumers and maintaining competition through, inter alia, the enforcement of the antitrust laws, including the development and articulation of the legal principles underlying such laws.

To the extent that the proposed DOT regulations rely by analogy[(2)] upon the scope of the Commission's unfairness authority as expressed in FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 244-45 n.5 (1972), the Department should be aware that the FTC's use of its unfairness doctrine has substantially evolved since Sperry. Confronted by concerns about the proper scope of the unfairness standard, the Commission in 1980 issued its "Unfairness Statement" in response to an inquiry from a congressional subcommittee.[(3)] In setting out the applicable standard, the Commission noted, among other things:

The present understanding of the unfairness standard is a result of an evolutionary process. The statute was deliberately framed in general terms since Congress recognized the impossibility of drafting a complete list of unfair trade practices that would not quickly become outdated or leave loopholes for easy evasions. The task of identifying unfair trade practices was therefore assigned to the Commission, subject to judicial review, in the expectation that the underlying criteria would evolve and develop over time.

Unfairness Statement at 2, 104 F.T.C. at 1072. The Commission also noted that "[u]njustified consumer injury is the primary focus of the FTC Act" (id. at 1073) and stated that to justify a finding of unfairness, any consumer injury must

15 U.S.C. § 45(n).

under the Federal Trade Commission Act," Association of National Advertisers Publication, 1991 (also discussing the Commission's use of unfairness subsequent to 1980).

4. The Commission clarified that the use of public policy is not an independent basis for finding unfairness, but rather that it "may provide additional evidence" of unfairness, in a March 5, 1982 letter to Senators Packwood and Kasten. The reduced role of public policy is also evident in the Credit Practices Rule, as adopted by the Commission in 1984:

Earlier articulations of the consumer unfairness doctrine have also focused on whether "public policy" condemned the practice in question. In its December 1980 statement, the Commission stated that it relies on public policy to help it assess whether a particular form of conduct does in fact tend to harm consumers. We have thus considered established public policy "as a means of providing additional evidence on the degree of consumer injury caused by specific practices."

Credit Practices Rule, Statement of Basis and Purpose and Regulatory Analysis, 49 Fed. Reg. 7740, 7743 (Mar. 1, 1984). Congress subsequently codified this reduced role in 1994.

5. Federal Trade Commission Act Amendments of 1994 (H.R. 2243).

6. See, e.g., Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456 (1993); Aquatherm Indus., Inc. v. Florida Power & Light Co., 145 F.3d 1258, 1262 (11th Cir. 1998).

7. See, e.g. K. Glazer & A. Lipsky, Jr., Unilateral Refusals to Deal Under Section 2 of the Sherman Act, 63 Antitrust L.J. 749, 783-85 (1995); P. Areeda & H. Hovenkamp, Antitrust Law ¶¶ 652b.2, 774d (2d. ed. 2002).

8. Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP (Sup. Ct. May 2003) (No. 02-682), http://www.usdoj.gov/atr/cases/f201000/201048.pdf.

9. P. Areeda & H. Hovenkamp, Antitrust Law ¶ 651f, at 83-84 (2d ed. 2002); see Spectrum Sports, supra, 506 U.S. at 458-59.

10. Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 602, 605 n.32 (1985).